SUPREME COURT, U. S.

FILED

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1230

LOUIS R. SNELLING, III,

Petitioner,

vs.

CHELTENHAM NATIONAL BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

The petitioner, Louis R. Snelling, III, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Pennsylvania rendered in these proceedings on January 2, 1975.

OPINIONS BELOW

This petition seeks review of the order of the Pennsylvania Supreme Court (per curiam) denying a petition for allowance of appeal from a judgment of the Superior Court. The opinion of the Superior Court appears as of now only in 326 A.2d 557 (1974). The opinion of the Court of Common Pleas of Montgomery County is reported in 98 Montg. Co. L. R. 13 (1974). A copy of both opinions are appended to this petition as Appendix A and B (1a-17a).

JURISDICTION

The order of the Pennsylvania Supreme Court was entered on January 2, 1975. This petition is filed pursuant to 28 U.S.C. §1257(3) and 28 U.S.C. §2101, which provide as relevant:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a State's statute is drawn and questioned on the ground of its being repugnant to the Constitution of the United States . . . ."

and

> ". . . any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

QUESTION PRESENTED

The question before this Court for review is whether the confession of judgment procedure provided for in the Pennsylvania Rules of Civil Procedure, Rules 2950-2961, as interpreted under controlling case law in Pennsylvania, is unconstitutional as violative of the due process guarantees of the Fourteenth Amendment to the United States Constitution. (Rules are set forth in Appendix C 18a-26a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, as relevant, provides:

> "§1. *Citizens of the United States.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ."

Said constitutional provision is found in 1 U.S.C., 1970 ed., p. XLIX.

STATEMENT OF THE CASE

This case arises from the confession of judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, against petitioner by Cheltenham National Bank on April 6, 1973 in the amount of $187,062.02 pursuant to a judgment note. Petitioner filed a petition to open said judgment (Appendix D 27a), which, after depositions were taken, was denied. Said denial was appealed to the Pennsylvania Superior Court, which affirmed the action of the trial court in an opinion dated September 23, 1974. Petitioner then applied for a writ of

certiorari from the Pennsylvania Supreme Court, which was denied by order dated January 2, 1975.

The note upon which judgment was confessed came into existence during the course of a business venture between petitioner and Goodway Copy Centers, Inc. This venture had been undertaken in August, 1969 and involved the creation, development and operation of a 100 copy center network within a period of seven years. Goodway undertook to locate, establish, equip and manage said centers as they came into existence, in return for which petitioner agreed to purchase said centers as completed. In this regard, certain representations as to expertise, capability, initial capitalization and profitability were made by Goodway and relied upon by petitioner. Shortly thereafter, petitioner transferred all his right in said venture to International Development Corp., a Pennsylvania Corporation in which he owned all the common stock.

In connection with his venture, the President of Goodway applied to Cheltenham in late December, 1969, for a $150,000 loan to be used in the opening of copy centers under this venture. The president disclosed at that time the proposed use of the loan proceeds, the general nature of the business, the capacity for repayment from the venture, and other relevant factors. Prior to that point, Goodway apparently had no banking relationship with Cheltenham.

At the time application was made, Cheltenham advised that it would be necessary to obtain some security if the loan application were to be considered. Subsequently, Goodway

caused its counsel to prepare the subject note payable to Goodway, which was executed by petitioner on February 27, 1970. The loan was granted on March 24, 1970 and the note was assigned by Goodway to Cheltenham on March 24. All proceeds of the loan were paid to Goodway or were paid into accounts over which only Goodway had signing authority. Interest payments were made on said loan until sometime in 1971, when no further payments of interest or principal were made.

In the meanwhile, Goodway had defaulted in its agreement with petitioner. Goodway fell behind the schedule for the opening of copy centers by December, 1970, became delinquent in payments to its suppliers in 1970, mismanaged opened centers resulting in their closing, and failed to remit federal payroll taxes in 1971. These factors continued thereafter, resulting finally in levies by the Internal Revenue Service in 1972 against the copy centers then open. Petitioner then commenced suit against Goodway in the Federal District Court for the Eastern District of Pennsylvania, CA 72-1711 for rescission and other relief in August, 1972. Said relief was granted in July, 1974. Cheltenham commenced the present action against petitioner in April, 1973 as described hereinabove.

The question of the unconstitutionality of the confession of judgment procedure was raised in Count Three of the petition to open and set aside confessed judgment (27a), which was filed with the Court of Common Pleas of Montgomery County. The trial court tersely dismissed the contention of a violation of the due process rights in its opinion (see Appendix A 7a). Petitioner raised the constitutional question in his brief

(Appendix E 28a) in the appeal to the Superior Court. However, the Superior Court did not reach the constitutional question, holding that petitioner was equitably estopped from asserting any defenses. Petitioner raised the constitutional question in his petition for allowance of appeal (Appendix F 34a) to the Pennsylvania Supreme Court. Said petition was, however, not allowed. Petitioner has attached the relevant portions of the petition to open, appellant's brief before the Pennsylvania Superior Court and the petition for allowance of appeal to the Pennsylvania Supreme Court.

ARGUMENT

Boddie v. Connecticut, 401 U.S. 371, 377 (1971), establishes that due process, as guaranteed under the Fourteenth Amendment to the United States Constitution, requires that, in the absence of countervailing State interests of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

It is petitioner's contention that, under controlling case law, the Pennsylvania procedure whereby a judgment debtor seeks to open a confessed judgment is constitutionally deficient in that it fails to provide the judgment debtor with a meaningful opportunity to be heard in his defense. The Pennsylvania procedure is defective in the following regard:

A. *To open a confessed judgment, the judgment debtor must show more than a meritorious defense* — A line of

Argument

Pennsylvania appellate decisions clearly establishes that a judgment debtor has a formidable burden. Where an application is made to open a confessed judgment, the relief demanded is in equity and the applicant must make out a case which would justify a chancellor in entering a decree, *Kline v. Fitzgerald Brothers,* 267 Pa. 468 (1920). In a proceeding to open judgment, petitioner must aver not only the existence of a valid defense but also equitable considerations which impress the court with the need for relief, *Brunwasser v. Christopher,* 192 Pa. S. 305 (1960); *Bucks County Bank and Trust Company v. DeGroot,* 226 Pa. S. 419 (1973). Courts are not required to open judgments merely because the defendant produces evidence which, if true, would constitute a defense! See *Berkowitz v. Kass,* 351 Pa. 263 (1945), citing cases therein; *Sugarman v. Baldini,* 161 Pa. S. 136 (1947); *Steigleman v. Sciotto,* 388 Pa. 113 (1957). Finally, such relief (opening a confessed judgment) is of grace and not of right! *Roche v. Lankin,* 406 Pa. 92 (1962).

B. *The burden of proof is greater than would otherwise be the case if suit were commenced in the normal manner* — As stated in *Small v. Small,* 185 Pa. S. 468 (1958), the burden of the petitioner is to show by a preponderance of the evidence that a jury ought to find in his favor. There must be more than a mere conflict of evidence; it is not a case of oath against oath, but there should be such evidence that carries a conviction as to truth, so that a chancellor in forming his deliberate judgment is impressed with the facts that the ends of justice would be met by opening the judgment, *Mielcuszny v. Rosol,* 317 Pa. 91 (1934); *Sugarman, supra.* In *Kline, supra,* the Court said that the judgment debtor must present evidence that is clear, precise and

indubitable. Compare this burden with the burden upon judgment debtor in similar proceedings in Ohio, concurring opinion of Justice Douglas, *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

C. *Opening of the judgment is so much within the discretion of the trial court as to be arbitrary and unreasonable* — The arbitrariness of the procedure becomes manifest when one assays the degree of appellate review. Where the proofs are contradictory and simply create a doubt as to the real justice and equity in the case, the refusal of the court below to open judgment will not be reversed, *Small, supra.* Again, a petition to open confessed judgment is equitable in nature, and we will reverse the determination of the court below only for clear and manifest abuse of discretion, *Bergman v. Bonetti,* 192 Pa. S. 170 (1960); *Berkowitz, supra; Brunwasser, supra; Small, supra; Roche, supra.* Abuse of discretion occurs when the decision involves misapplication of principles of law, or the judgment is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will. Appellate review in Pennsylvania can at best be described as uncritical and can thus allow divergent results throughout the State of Pennsylvania despite similar circumstances. A procedure that facilitates varying results cannot comport with due process.

D. *The Pennsylvania procedure whereby evidence is presented by deposition rather than in person before the judicial officer who must rule upon the petition to open is defective under the due process clause* — As stated in *Fuentes v. Shevin,* 407 U.S. 67 (1972), there is a duty of government wherein the

Argument

State is involved in any deprivation of a property interest, whether temporary or permanent, contingent or final, to follow a fair process of decision making . . . to protect against arbitrary deprivations of property. At a minimum, these requirements should be that there is a right to present relevant evidence to the judicial officer who makes the determination and to confront and cross-examine adverse witnesses in such officer's presence. This was recognized in *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Frost v. Weinberger,* 375 F. Supp. 1312 (1974), the court held that the failure to allow confrontation and cross-examination of witnesses was a denial of an "opportunity to be heard in a meaningful manner." The present procedure thus fails in this regard also to afford a meaningful opportunity to citizens of Pennsylvania and thereby fails to fulfill the promise of the due process clause.

The last question to be considered is whether petitioner has waived the protection of the due process clause. This court recognized in *Overmyer, supra,* that under certain circumstances, a waiver of the due process guarantees could be found, *i.e.,* that the waiver was voluntary, knowing and intelligently made.

In *Overmyer,* this court found waiver upon a careful review of the facts which disclosed that the cognovit note was the result of careful negotiations between the parties over a lengthy period of time, which was attended by counsel for the judgment debtor, and whereby the judgment debtor received identifiably real consideration for such note. This court wisely cautioned that the facts of each case would be significant.

Argument

In the present case, the facts are considerably different. The subject note was payable to Goodway Copy Centers, Inc. and was pledged to Cheltenham. The note was not a bona fide debt between petitioner and Goodway, but had been created as an accommodation of Cheltenham's request for collateral in connection with the loan. Petitioner did not have benefit of counsel in the execution of said note, In summary, none of the salient facts present in *Overmyer* exist in this case.

In addition and perhaps more importantly, petitioner submits that *Overmyer* is not directly on point. In that case, this court was considering the waiver of *prejudgment* notice and hearing, not all notice and all rights to a hearing. This was of particular concern to the court as it stated that *Overmyer* was not rendered defenseless by execution of the cognovit note. In the present case, petitioner does not attack the lack of prejudgment notice and hearing, but rather the statutory procedure whereunder he seeks to open the judgment. If this court finds waiver, it will effect hold that petitioner waived *all* rights to notice and hearing by executing the subject note. A considerable extension of *Overmyer* which is not warranted on the facts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Supreme Court of the State of Pennsylvania.

Respectfully submitted,

s/ J. Raymond Munholland
Attorney for Petitioner

BLUESTEIN & PRUSKY ASSOCIATES, P.C.
Of Counsel

APPENDIX A

OPINION AND ORDER OF THE COURT OF COMMON PLEAS

(Filed March 27, 1974)

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

No. 73-4213

CHELTENHAM NATIONAL BANK

v.

LOUIS R. SNELLING, III

In Assumpsit

HONEYMAN, J. March 27, 1974

In August of 1969, defendant, Louis R. Snelling, III, and Goodway Copy Center, Inc. entered into a business venture and committed themselves to a myriad of obligations in connection with the opening of approximately one hundred copy centers and the operation of these centers pursuant to a franchising agreement. This franchising agreement called for certain investment monies from the defendant. At Goodway's request

the defendant executed a promissory note to Goodway Copy Centers, Inc. in the amount of $150,000.00 on February 27, 1970. On March 24, 1970 Goodway assigned this note to plaintiff, Cheltenham National Bank, and the next day plaintiff loaned $150,000.00, the proceeds of which were deposited into a Goodway account and accounts held in the name of a wholly owned subsidiary of the defendant. For the next year defendant made interest payments on this loan to the plaintiff, and in March of 1971 the plaintiff made demand upon defendant and Goodway for all principal and accrued interest.

The plaintiff was unsuccessful in its attempts to secure payment of the principal and interest until December of 1971. At that time, in a meeting between plaintiff and defendant and the president of Goodway, defendant agreed to pay the principal and interest on a pay-out schedule of $20,000.00 immediately and quarterly payments thereafter of $25,000.00. But no payments were made, and plaintiff made request for collateral to secure the loan. In response thereto, in April of 1972, the defendant pledged securities via an agreement signed by defendant and delivered to plaintiff along with the securities. Payments still were not forthcoming and plaintiff confessed judgment against the defendant on April 6, 1973 in the amount of $187,062.02. On May 16, 1973, defendant filed a Petition to Open and Set Aside Confessed Judgment with a Rule to Show Cause addressed to plaintiff. Plaintiff filed an Answer to this Petition and the matter was ordered on the Long Argument List, after the taking of depositions. Extensive depositions were taken and transcribed. Plaintiff filed a Praecipe to List this matter on October 17, 1973, briefs were filed and oral argument was heard before this Court en banc on December 31, 1973.

Appendix A

Defendant contends that the note in question is non-negotiable and that plaintiff is not a holder in due course. We do not agree. The note in question is a negotiable instrument and the plaintiff is a holder in due course thereby cutting off all defenses not known to the plaintiff which could be raised by the defendant against Goodway and which may have existed between defendant and Goodway at the time the plaintiff took the note. *UCC 3-305, 4-305, P.L.E. Ng. Inst. Section 219.*

The Uniform Commercial Code Section 3-302 (12 A P.S. 3-302) defines a holder in due course as one who takes an instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. Defendant contends that the subject note is non-negotiable under the Uniform Commercial Code and applicable case law, and advances Section 3-112 of the Code (12 A P.S. 3-112) as authority for his proposition. The Section provides in part that:

> "(1) The negotiability of an instrument is not affected by
>
> (d) a term authorizing a confession of judgment if it is not paid when due."

Comment 2 to this section provides that confession of judgment is authorized only when the note is not paid when due, and that otherwise negotiability is affected. In light of the above, the defendant asserts that the words "before maturity" in the confession of judgment section of the promissory note in this

case destroy its negotiability. This position ignores the fact that the note in question is a demand note which became immediately due and payable after its making. The case of *Miners State Bank v. Aukzlokalnis*, 283 Pa. 18 (1925) cited by defendant is not dispositive of the case at bar since the note in that case was not, in fact, a demand note. A careful reading will show that the note in that case was dated January 5, 1920 and was payable "on demand after date due" but was "due on July 5, 1920", a date six months later. The note in that case contained a warrant of attorney to confess judgment at any time, and consequently, confession of judgment was in reality authorized before the due date thus rendering the note non-negotiable. On the other hand, the note here is a demand note and the words "before maturity" do not change the due date. Of its nature a demand note has no maturity date in that it is due at the option of the holder from the moment of making, in this case by confession of judgment. The words "before maturity" add nothing to the content of the note.

In construing a contract, repugnant or contradictory clauses or sentences must be reconciled if possible so that the whole agreement will be given effect as expressing the intention of the parties. *McMillin v. Titus*, 222 Pa. 500 (1909). In ascertaining the intent of the parties, it is proper to take into consideration all the negotiations leading to the formation of the contract, its subject matter, its purpose, the consideration and the circumstances under which the parties contracted. *McMillin* supra. A reading of the note here clearly shows the intention of the parties that the note be negotiable. More specifically the note refers to "any holder hereof" and authorizes "any holder hereof"

to accelerate payment and to confess judgment on the note. In addition, the testimony established that the note was made for the purpose of securing a loan from the plaintiff. (N.T. 231-32). It is significant that this testimony came from the mouth of the defendant. He cannot now be heard to say that the words "before or after maturity" in the note destroy the negotiability of that instrument since the intention of the parties and the note itself show that it was a demand note immediately due and payable upon which judgment could be confessed at any time. The body of the note opens "FOR VALUE RECEIVED, upon demand after date. . ."

Even if the plaintiff were not a holder in due course of the note, by reason of defendant's conduct and actions he has estopped himself from asserting any defenses he may have as to Goodway Copy Centers, Inc. against this plaintiff.

In general, estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by, among other things, that party's deeds, acts or representations, express or implied. *28 Am. Jur. 2nd, Estoppel and Waiver, Section 2.* Plaintiff contends that the case of *U.S. National Bank In Johnstown Et Al v. Drabish,* 187 Pa. Super. 169 (1959) firmly establishes the doctrine of estoppel in this area that prevents this defendant from raising any defenses against plaintiff which defendant might have against Goodway. That case concerned itself with two defendants who entered into a contract for the installation of a heating system in their home and signed a judgment note in order to pay the contractor. Both the

defendants and the contractor certified to the bank that the work was satisfactorily completed, and then the contractor assigned the note to the bank. The bank discounted the note, paid the contractor and entered judgment on the note. The defendants petitioned to open the judgment claiming that the work was unsatisfactory. The Court held that the defendants had estopped themselves from making a defense, and set out the essential elements of an equitable estoppel as related to the party claiming the estoppel. They are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

There is no question in this case that the plaintiff could not have had any knowledge of any problems existing between defendant and Goodway at the time plaintiff loaned the money. In addition, the plaintiff continued to extend the time of payment of the principal of the loan on the basis of defendant's representations at the December, 1971 meeting at which the pay-out schedule was arranged. Furthermore, the plaintiff continued to forbear from resorting to legal remedies on the basis of defendant's actions in putting up collateral for the loan. The plaintiff in this case clearly relied to its detriment and prejudice in that, presently, all other parties to the transactions have either ceased to exist, filed for bankruptcy, or are financially distressed. The note here was advanced to raise money as in the *Johnstown* case. The bank in both cases was a mere lender. It was not assigned the contract along with the note, and had no obligation to complete the contract or in any other way become

a party thereto. If the consideration in the contract failed or there was fraud involved, that is a question to be resolved between the defendant and Goodway.

We will not dignify by extended comment the other contention of the defendant, viz. that the confession of judgment herein was unconstitutional by reason of the decision in *Swarb v. Lennox*, 314 F. Supp 1091 (1970). This defendant is obviously a very affluent person with income well in excess of the $10,000.00 dividing line set forth in *Swarb*. The decision therein was never intended to apply to a sizable business loan made by an astute and affluent businessman.

ORDER

AND NOW, this 27th day of March, 1974, the Petition to Open and Set Aside Confessed Judgment is dismissed and the Rule entered therein is discharged.

BY THE COURT:

s/ Robert W. Honeyman

Court en Banc:

Honeyman, J
Vogel, J
Stefan, J

Harry C. Barbin, Esq., Attorney for Plaintiff
J. Raymond Munholland, Esq., Attorney for Defendant

APPENDIX B

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

In The
SUPERIOR COURT OF PENNSYLVANIA

No. 847 October Term, 1974

Filed: September 23, 1974

J. 817

CHELTENHAM NATIONAL BANK

v.

LOUIS R. SNELLING, III,

Appellant

Appeal from the Court of Common Pleas of
Montgomery County, Civil Action-Law, No. 73-4213.

OPINION BY HOFFMAN, J.:

This appeal is from an order of the Court of Common Pleas of Montgomery County dismissing appellant's petition to open and set aside a confessed judgment. We must determine whether a clause allowing judgment to be confessed "at any time" renders

the instrument non-negotiable; if so, we must determine whether principles of equitable estoppel preclude the appellant from asserting defenses against the appellee, the present holder of the instrument.

The complex facts of this case may be summarized as follows: On August 14, 1969, Goodway Copy Centers, Inc. ("Goodway") and appellant entered into a franchise arrangement whereby Goodway promised to locate, establish, equip and manage 100 copy centers within a period of seven years. In return, appellant agreed to purchase the centers as completed. Shortly thereafter, appellant transferred all his right in this venture to International Development Corp. ("IDC"), of which appellant was the sole shareholder. Goodway was represented in these negotiations by Mr. Donald Wolk.

In December, 1969, Mr. Wolk applied to Cheltenham National Bank ("Cheltenham") for a loan. Appellant did not participate in any negotiations. Appellant testified that Mr. Wolk told him that Cheltenham would require a promissory note as a prerequisite to granting the loan. On February 27, 1970, appellant executed a demand note to the order of Goodway in the amount of $150,000.[1]

Cheltenham was aware that the purpose of the loan was to enable Goodway to purchase five copy centers. Cheltenham

1. Under the Uniform Commercial Code, "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated." 12A P.S. §3-108. A demand note is due and payable immediately at the option of the holder. *Master Homecraft Co. v. Zimmerman*, 208 Pa. Superior Ct. 401, 222 A.2d 440 (1966).

never saw the master agreement between appellant and Goodway but did possess a copy of Goodway's prospectus and appellant's financial statement. On March 24, 1970, Goodway assigned appellant's note to Cheltenham and the bank approved the loan application. $132,000 was deposited into a Goodway account and $18,000 was deposited into accounts held by IDC.

Appellant paid the interest on the loan for the first year. In March, 1971, Cheltenham demanded that Goodway make a principal payment on the loan, and on July 20, 1971, made the same demand of appellant. In late November, 1971, there was a meeting attended by appellant, Mr. Wolk, and Mr. Monroe Long, President of Cheltenham. Mr. Long testified that a repayment schedule was agreed to at that meeting. Appellant's testimony is in conflict, but a letter from appellant to Mr. Long, dated December 15, 1971, states: "I feel confident that a substantial payment can be made sometime prior to the end of December." In March, 1972, appellant pledged almost 19,000 shares of Snelling & Snelling stock to Cheltenham as collateral. No payments of principal were ever made.

Eventually, Goodway sold all of its business other than the venture with appellant to another firm. The completed centers that appellant had purchased from Goodway during the interim were closed by an Internal Revenue Service levy. In August, 1972, appellant filed suit against Goodway in Federal District Court. On April 6, 1973, Cheltenham confessed judgment on the promissory note assigned to it by Goodway. On May 16, 1973, appellant filed a Petition to Open Judgment. Appellee filed an Answer to this Petition and extensive depositions were taken

and transcribed. On December 31, 1973, the lower court heard oral arguments. On the basis of the depositions, briefs, and argument, the court denied appellant's Petition to Open Judgment on the grounds that Cheltenham was the holder in due course of a negotiable instrument and alternatively, "[e]ven if the plaintiff were not a holder in due course of the note, by reason of defendant's conduct and actions he has estopped himself from asserting any defenses he may have as to Goodway Copy Centers, Inc. against this plaintiff." This appeal is taken from the denial of said Petition.

In its Petition to Open and Set Aside Confessed Judgment, appellant asserts that Goodway procured the Master Agreement by fraudulent misrepresentations and that Goodway was in breach of said agreement. These defenses are "personal" and will not prevail against a holder in due course.[2] Appellant contends, however, that Cheltenham cannot be a holder in due course because the instrument assigned to it contained a clause authorizing confession of judgment "at any time", and was therefore a non-negotiable note. Thus, appellant claims that Cheltenham is merely an assignee whose rights rise no higher than those of its assignor.

The Uniform Commercial Code, §3-112, provides that "(1) the negotiability of an instrument is not affected by . . . (d) a term authorizing a confession of judgment on the instrument *if it*

2. Under 12A P.S. §3-305, a holder in due course takes the instrument free from all "personal" defenses of any party to the instrument with whom he has not dealt, but takes the instrument subject to five specifically delineated "real" defenses. 12A P.S. §3-306 provides that if one is not a holder in due course, he takes the instrument subject to, *inter alia*, all contract defenses and the defenses of want or failure of consideration.

is not paid when due." (Emphasis added.) Thus, a confession of judgment clause is authorized by the Code *only* if the instrument is not paid when due. If the clause allows judgment to be confessed at a time prior to a default, the clause renders the instrument nonnegotiable. *Funds for Business Growth, Inc. v. Maraldo*, 443 Pa. 281, _ A.2d (1971), involved a confession of judgment clause in a nonnegotiable note. The Court stated at 283: "Appellee had recorded the note on January 20, 1961, immediately after its execution on January 19, 1961, so that judgment was confessed against all parties prior to any default. . . . Section 3-112 (1) (d) (12A PS) provides that negotiability is not affected by a term in the instrument that permits confession of judgment if it is not paid when due. This has been held to mean that a note which authorized confession of judgment at any time before or after maturity, as is the case here, is a nonnegotiable instrument." The instrument in question provides in pertinent part: "And to secure the payment of said amount we hereby authorize, . . . any Attorney of any Court of Record to appear for us in such Court, . . . *at any time* before or after maturity and confess a judgment . . . " (Emphasis added).

Appellee argues that the instrument is negotiable because it is a demand note and is thus immediately due and payable after its making. Appellee asserts, therefore, that the words "before maturity" are mere surplusage and have no effect on negotiability. However, the crucial language in the instrument is the words "at any time." The significance of these words is that confession of judgment is authorized whether or not a default has occurred. Under appellee's interpretation, Cheltenham could have confessed judgment immediately upon receiving the

instrument without ever demanding payment.[3] Holding the note negotiable under this interpretation is at odds with both the language of §3-112 (1) (d) and applicable precedent.

In *Smith v. Lenchner*, 204 Pa. Superior Ct. 500,_ A.2d (1964), this Court held that a demand note having a confession of judgment clause authorizing confession at any time was nonnegotiable: "Prior to the enactment of the Code, a note containing a warrant of attorney to confess judgment *at any time* was held to be a nonnegotiable instrument . . . . This rule was applied to a demand note . . . . The same result has been reached in cases subsequent to the enactment of the Code." 204 Pa. Superior Ct. at 505. Under the law of this Commonwealth, the note assigned to Cheltenham was nonnegotiable and Cheltenham took it subject to any defenses appellant could assert against Goodway.

In order to successfully petition to open a confessed judgment, one must act promptly and aver a meritorious defense, *Wenger v. Ziegler*, 424 Pa. 268,_ A.2d __ (1967); however, "[a] petition to open judgment is addressed to the sound discretion of the court and is an appeal to the court's equitable powers." *Wenger*, supra, at 273. Courts have always recognized that equitable estoppel may bar a meritorious defense even in contract-assignment cases See, e.g., *Northwestern National Bank v. Commonwealth*, 345 Pa. 192,_ A.2d _(1942).

3. The official comment to §3-112(1) (d) states: "The use of judgment notes is confined to two or three states, and in others the judgment clauses are made illegal or ineffective either by special statutes or by decision." Thus, close judicial scrutiny is essential.

Therefore, even though the note is nonnegotiable, if the facts warrant an equitable estoppel, appellant is precluded from asserting defenses against an assignee.

The essential elements of an equitable estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. *United States National Bank in Johnstown v. Drabish,* 187 Pa. Superior Ct. 169, _ A.2d _ (1958).

The record reveals that Cheltenham was unaware at the time it assumed the note that Goodway may have procured its contract with appellant by means of fraudulent misrepresentation or that Goodway may have been in breach of contract. Cheltenham was merely a lender who assumed a promissory note in return for approving a loan; it was not a *contract* assignee. In fact, Cheltenham never saw the contract between appellant and Goodway until after judgment had been confessed. It is true that Cheltenham was aware of the purpose of the loan and knew that an arrangement between Goodway and appellant existed. §3-304 (4) (b) of the Code provides, however, that: "(4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim . . . (b) that it was issued or negotiated in return for an executory promise or *accompanied by a separate agreement,* unless the purchaser has notice that a defense or claim has arisen from the same terms thereof." (Emphasis added). There was no reason for

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Cheltenham to be put on notice of any defenses from the mere fact of the separate agreement. The Bank had a copy of Goodway's prospectus and a copy of appellant's financial statement. Cheltenham was also aware of Mr. Snelling's personal reputation in the business community. On that basis, consistent with its policies, Cheltenham loaned Goodway and IDC $150,000 and received appellant's promissory note in return.

The second element of equitable estoppel is reliance. The facts show that Cheltenham began demanding principal payments as early as March 1971. Letters from appellant to Cheltenham dated August 4, 1971, and December 15, 1971, contain promises from appellant to institute a schedule in order to repay the loan in full.[4] Cheltenham relied on these letters to forbear from confessing judgment at those times. The March, 1972 pledge of Snelling & Snelling stock induced further reliance on the part of Cheltenham. The Bank could reasonably view appellant's conduct as indicative of a bona fide intent to repay.

4. On August 4, 1971, appellant wrote to Mr. Long:

> "This will acknowledge receipt of your recent letter concerning the $150,000 loan to International Development Corporation.
>
> "We have been remiss in setting up a definite repayment plan covering the reduction of the principal, and I appreciate your consideration and understanding in this matter.
>
> "*We will institute, beginning with the month of August, a regular repayment schedule which will continue on a monthly basis until such time as the entire loan is repayed.* This amount will fluctuate from time to time depending on the availability of funds at that particular time." (Emphasis added).

(Cont'd)

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In *United States National Bank in Johnstown v. Drabish,* supra, a petition to open judgment was denied. The facts presented in this case are similar: the note was given for the purpose of raising money; the bank was only a lender and not a contract assignee; and the bank was unaware of any possible defenses that the maker could assert against the original holder of the instrument. These facts distinguish the present case from those decisions which granted petitions to open judgment. For example, in *Fidelity Trust Co. v. Gardiner,* 191 Pa. Superior Ct. 17,__A.2d__(1959), the entire factual situation was permeated with fraud. The appellant had been dealing with an imposter and there was sufficient evidence to put the bank-assignee on notice of that fact. See also, *Bittner v. McGrath,* 186 Pa. Superior Ct. 477,__ A.2d__(1958) (Plaintiff clearly aware of the existence of defenses against his assignor); *Standard Furnace Co., Inc. v. Roth,* 102 Pa. Superior Ct. 341,__A.__(1931) (Bank a contract assignee as well as a lender). There are no circumstances in the present case which would have imposed a duty on Cheltenham to make further inquiries.

(Cont'd)

The December 15, 1971 letter states in pertinent part:

> "As a follow-up to our meeting of several weeks ago between yourself, Mr. Wolk and I, at which time we felt strongly that some type of payment could be made on the principal on the outstanding loan to International Development Corporation . . . .
>
> "As the situation now exists, *I feel confident that a substantial payment can be made sometime prior to the end of December.* While this deviates somewhat from our original committment, I would feel that you would be in a position to go along with this slight delay of several weeks." (Emphasis added).

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Cheltenham waited more than three years from the time it obtained the note until it confessed judgment. This delay has resulted in a prejudicial change in Cheltenham's position. At the time judgment was finally confessed, Goodway had sold all of its assets, IDC was virtually inactive, and the Snelling & Snelling stock pledged as collateral was considerably reduced in value. The difficulty of obtaining repayment is self-evident from the state of affairs existing at the time judgment was confessed.

We hold that the note in question is nonnegotiable, but that appellant is barred by principles of equitable estoppel from asserting any defenses he may have. Therefore, the order of the court below is affirmed.

Jacobs, J., concurs in the result.

APPENDIX C

PENNSYLVANIA RULES OF CIVIL PROCEDURE

Confession of Judgment For Money

Rule 2950. Definition

As used in this chapter

"action" means a proceeding to enter a judgment by confession for money pursuant to an instrument authorizing such confession.

Added June 27, 1969. Eff. Jan. 1, 1970.

Rule 2951. Methods of Proceeding

(a) Judgment by confession may be entered by the prothonotary, as authorized by the Act of February 24, 1806, P.L. 334, 4 Sm.L. 270, sec. 28, as amended, 12 P.S. §739, without the agency of an attorney and without the filing of a complaint, declaration or confession, for the amount which may appear to be due from the face of the instrument. The judgment may include interest computable from the face of the instrument.

Note: For collection of attorneys' fees under such a judgment see Rule 2957. If an instrument authorizes confession for a penal sum judgment may be entered in that amount.

(b) An action which is not filed under the Act of February 24, 1806, P.L. 334, 4 Sm.L. 270, sec. 28, as amended, 12 P.S.

§739, shall be commenced by filing with the prothonotary a complaint substantially in the form provided by Rule 2952. Even though the instrument is one on which judgment could be entered by the prothonotary under the Act of 1806, the plaintiff may commence the action by filing a complaint.

Note: The Act of March 21, 1806, P.L. 558, 4 Sm.L. 326, sec. 8, 12 P.S. §738, relating to amicable actions and confession of judgment thereon is suspended since these rules provide a complete procedure for such cases.

(c) If the instrument is more than ten (10) years old or if the original cannot be produced for filing or if it requires the occurrence of a default or condition precedent before judgment may be entered, the occurrence of which cannot be ascertained from the instrument itself, the action must be brought under Subdivision (b).

(d) If the instrument is more than twenty (20) years old, judgment may be entered only by leave of court after notice and the filing of a complaint under Subdivision (b).

(e) When the plaintiff proceeds under Subdivision (b) and the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, judgment may be entered only by leave of court after notice.

Added June 27, 1969. Eff. Jan. 1, 1970. Amended Jan. 20, 1970. Eff. Feb. 15, 1970.

Note: The procedure for notice and hearing shall be in accordance with local practice.

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See sec. 401(h) and sec. 1205 of the Goods and Services Retail Installment Sales Act, 1966, Special Sess. No. 1, October 28, P.L. 7, effective April 1, 1967, 69 P.S., 1401(h) and 2205 which may limit the venue for commencement of an action in certain cases.

Rule 2952. Complaint. Contents

The complaint shall contain the following:

(a) the names and last known addresses of the parties;

(b) the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature; if the original is not attached, an averment that the copy attached is a true and correct reproduction of the original; if neither the original nor a reproduction can be attached, an explanation why they are not available;

Note: If the original instrument is not attached to the complaint, a method of securing inspection thereof is provided by Discovery Rule 4009.

(c) a statement of any assignment of the instrument;

(d) either a statement that judgment has not been entered on the instrument in any jurisdiction or if it has been entered an identification of the proceedings;

Note: Whether a prior entry of judgment has exhausted the warrant is a matter of substantive law.

(e) if the judgment may be entered only after a default or the occurrence of a condition precedent, an averment of the default or of the occurrence of the condition precedent;

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(f) an itemization of the amount then due, which may include interest and attorneys' fees authorized by the instrument;

(g) a demand for judgment as authorized by the warrant;

Note: If the instrument authorizes confession for a penal sum judgment may be entered in that amount.

(h) if the instrument is more than twenty (20) years old, or if the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, an application for a court order granting leave to enter judgment after notice.

Note: The procedure for notice and hearing will be in accordance with local practice.

(i) signature and verification in accordance with the rules relating to the action of assumpsit.

Added June 27, 1969. Eff. Jan. 1, 1970. Amended Jan. 20, 1970. Eff. Feb. 15, 1970.

Rule 2953. Successive Actions

(a) Where an instrument authorizes judgments to be confessed from time to time for separate sums as or after they become due, successive actions may be commenced and judgments entered for such sums.

(b) If an instrument authorizes entry of judgments for money and in ejectment, the entry of judgment in ejectment shall not prevent the entry of judgment for money.

Added June 27, 1969. Eff. Jan. 1, 1970.

Note: The limits within which the plaintiff may have satisfaction under one or both of these judgments is a matter of substantive law.

Rule 2954. Judgment in Name of Holder, Assignee or Transferee

Judgment shall be entered only in the name of a holder, assignee or other transferee.

Added June 27, 1969. Eff. Jan. 1, 1970.

Rule 2955. Confession of Judgment

(a) In an action commenced by a complaint under Rule 2951 (b), the plaintiff shall file with the complaint a confession of judgment substantially in the form provided by Rule 2962.

(b) The attorney for the plaintiff may sign the confession as attorney for the defendant unless an Act of Assembly or the instrument provides otherwise.

Added June 27, 1969. Eff. Jan. 1, 1970. Amended Jan. 20, 1970. Eff. Feb. 15, 1970.

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Note: There are local rules in some counties requiring the filing of an affidavit of non-military service. See also the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix §520.

The Act of May 17, 1929, P.L. 1804, as amended by the Act of June 25, 1937, P.L. 2325, sec. 1, 12 P.S. §743, requiring certification of the precise residence address of the plaintiff and the last known address of the defendant, remains unsuspended by these rules.

Rule 2956. Entry of Judgment

The prothonotary shall enter judgment in conformity with the confession.

Added June 27, 1969. Eff. Sept. 1, 1970.

Note: As to instruments more than 20 years old see Rules 2951(d) and 2952(h).

Rule 2957. Execution. Amount. Items Claimed

Plaintiff may include the amount due, interest, attorneys' fees and costs in his praecipe for a writ of execution under Rule 3251(5). However, where judgment has been entered under Rule 2951(a) and there has been a record appearance of counsel at any stage of the proceedings and attorneys' fees are authorized in the instrument, these fees may be included in the praecipe for a writ of execution in whole or in part to the extent that the total amount claimed, excluding interest, does not exceed the amount of the judgment.

Added June 27, 1969. Eff. Jan. 1, 1970.

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Rule 2958. Execution. Notice of Entry of Judgment

(a) Within twenty (20) days after the entry of judgment the plaintiff shall mail to the defendant, by ordinary mail addressed to the defendant at his last known address, written notice of the entry setting forth the date, the court, term and number and the amount of the judgment, and file with the prothonotary an affidavit of mailing of the notice. Failure to mail the notice and file the affidavit shall not affect the lien of the judgment.

(b) Within twenty (20) days after the entry of judgment the plaintiff may issue a writ of execution even if the notice has not yet been mailed and the affidavit of mailing has not yet been filed. The lien of any levy or attachment made pursuant to such a writ within or after the twenty (20) day period shall be valid. However no further proceedings may be had pursuant to such writ until twenty (20) days after the notice has been mailed and the affidavit of mailing has been filed.

(c) If no affidavit has been filed within the twenty (20) day period after the entry of judgment, no writ of execution may be issued thereafter until twenty (20) days after the affidavit of mailing has been filed.

(d) At the time of the issuance of a writ of execution upon a judgment entered by confession the prothonotary shall endorse thereon the date of the judgment, that the judgment was entered by confession and if an affidavit of mailing has been filed the date of the filing of the affidavit.

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(e) No waiver of notice or of the filing of the affidavit of mailing shall be valid.

Added June 27, 1969. Eff. Jan. 1, 1970. Amended Jan. 20, 1970. Eff. Feb. 15, 1970.

Rule 2959. Striking Off or Opening Judgment. Pleadings. Procedure

(a) Relief from a judgment by confession shall be sought by petition. All grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. The return day of the rule shall be fixed by the court by general rule or special order.

(c) A party waives all defenses and objections which he does not include in his petition or answer.

(d) The petition and the rule to show cause shall be served as provided in Rule 233, and the answer as provided in Rule 1027.

(e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence. The court for cause shown may stay proceedings

on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment.

Added June 27, 1969. Eff. Jan. 1, 1970.

Rule 2960. Proceedings upon Opening of Judgment. Pleadings

If a judgment is opened in whole or in part the issues to be tried shall be defined by the complaint if a complaint has been filed, and by the petition, answer and the order of the court opening the judgment. There shall be no further pleadings.

Added June 27, 1969. Eff. Jan. 1, 1970.

Rule 2961. Effective Date. Pending Actions

These rules shall become effective on the first day of January, 1970. These rules shall apply only to actions commenced after the effective date except Rules 2959 and 2960 which also apply to judgments theretofore entered.

Added June 27, 1969. Eff. Jan. 1, 1970.

APPENDIX D

PETITION TO OPEN AND SET ASIDE CONFESSED JUDGMENT

* * *

COUNT THREE

(Open Judgment)

14. Petitioner incorporates herein by reference the averments of Paragraphs 1-3 above as if the same were set forth at length.

15. Petitioner is informed by counsel, believes, and therefore avers that unless the aforesaid entry of judgment by confession is opened, and a hearing granted on the merits as outlined in this Petition, Petitioner's due process rights under the United States Constitution and the Pennsylvania Constitution will have been violated.

WHEREFORE Petitioner prays that the judgment by confession entered in the above cause be opened of record, and Petitioner be granted leave to file an Answer to the Complaint.

* * *

APPENDIX E

PORTION OF APPELLANT'S BRIEF BEFORE THE PENNSYLVANIA SUPREME COURT

IV.

Absent a clear showing of voluntary waiver, the entry of judgment by confession is a violation of due process guarantees of the United States Constitution.

Appellant submits that, under recent Supreme Court decisions, the confession of judgment procedure in effect in Pennsylvania is constitutionally deficient, absent a clear showing of voluntary waiver of rights. The due process clause of the Fourteenth Amendment to the United States Constitution provides:

> "No person shall be deprived of life, liberty or *property* without due process of law."

These statutes are defective because they fail to afford the debtor adequate notice and a reasonable opportunity to be heard before a judgment is entered against him. Such notice and opportunity to be heard have long been recognized as requisites before one is deprived of any significant property interest, *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971).[3]

3. Such opportunity for hearing must come at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), removed all doubt that the protection of the Fourteenth Amendment does not depend on the nature of the property interest subject to deprivation and does apply to "any significant property interest."

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The constitutionality of Pennsylvania's cogovit system was challenged and found to be wanting as to a certain class[4] in *Swarb v. Lennox*, 314 F. Supp. 1091 (1970). The Court noted that the debtor must proceed by petition and deposition before he gets his day in court. The debtor must hire an attorney to undertake the preparation of such petitions and depositions and any other expenses necessary therefore. The debtor was also forced to incur costs in order to stay a sheriff's sale for the property, if execution had been obtained on the judgment. In proceeding by deposition, the aspect of credibility of witnesses is removed from the Court's consideration. The cumulative effect of these factors is to force upon the defendant a heavy expense coupled with an extreme burden of proof, which is inconsistent with procedural due process under the Fourteenth Amendment.

This case and another case challenging cognovit procedures *D. H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972) were appealed to the United States Supreme Court, which issued its opinion in both cases the same day. The Supreme Court upheld the District Court decision in *Swarb*, and indicated its opinion of the Pennsylvania procedure, when it stated:

4. Although the suit was instituted on behalf of all persons affected by these statutes, the holding was limited to a class of individuals whose annual income was less than $10,000. The reason therefor is that the plaintiffs in *Swarb* proceeded by way of class action under Rule 23(a) of the *Federal Rules of Civil Procedure*. Under said rules, the District Court had to initially evaluate whether the plaintiffs had established a proper class. The District Court determined that only four (4%) percent of the plaintiffs in the *Swarb* case had an annual income in excess of $10,000 and the Court concluded that they were not adequate representatives of the class of all persons affected by these statutes. The Court therefore limited the class to those persons whose incomes were less than $10,000 annually.

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> "The pervasive and drastic character of the Pennsylvania system has been noted."

This comment is significant in light of the fact that the Supreme Court restricted its holding in *Overmeyer* to the precise facts of that case:

> "We therefore hold that Overmeyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences."[5]

The Supreme Court reiterated the importance it attaches to procedural due process in *Fuentes v. Shevin, supra,* fn. 2, when it struck down as unconstitutional the Pennsylvania ex parte replevin statute:

> "The constitutional right to be heard is a basic aspect of the duty of government to provide a fair process of decision making when it acts to deprive a person of his possessions."

Further, the Court recognized that the state could effectuate the basic purpose of its legislation without offending due process requirements:

---

5. Under the Ohio cognovit procedure, the debtor has a burden of proof no greater than normal and the hearing is before the Court.

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"The requirements of notice and an opportunity to be heard raise no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making then works, by itself, to protect against arbitrary deprivation of property."

There is but a slight difference between an ex parte replevin law and a confession of judgment law. The former provides for the seizure of the defendant's goods prior to notice for hearing, which would afford him an opportunity to be properly heard. The latter causes a final judgment to be entered against the defendant, also without notice or hearing. Thus, a creditor who believes his debtor to be in default on a note containing a confession of judgment of clause may under these statutes cause the Prothonotary to enter judgment in his favor. A judgment so entered has the same effect in point of law as any other final judgment and execution may issue, although the defendant never had an opportunity to be heard in Court on the merits of defenses he may have. The only recourse the debtor is left with is to move to strike the judgment or move to open the judgment. The motion to strike will be granted only if there is some defect in the judgment evident on the record. If the motion to open is filed, the defendant must not only aver meritorious defenses, but he may also have to show the Court equitable consideration which impress the Court with need for relief.

From the time the judgment is entered, the action of the Court or its agent is merely ministerial. The Court has thereby been robbed by statute of the discretionary function it customarily performs and must perform in affording a defendant the reasonable opportunity to be fairly heard that is required by the

due process clause of the Fourteenth Amendment. At that point, the debtor is powerless to transfer good title to any real estate owned by him and his creditworthiness may be substantially impaired.

Courts have begun to recognize that statutory schemes that provide for the impairment of any significant property interest upon the directions of only the creditor prior to a hearing must be considered repugnant to the United States Constitution. In *Lynch v. Household Finance Corporation,* 360 F. Supp. 720 (Dist. of Conn. 1973), the Federal District Court struck down the Connecticut pre-judgment foreign attachment or garnishment statute as violative of due process. In *Clement v. Four North State Street Corp.,* 360 F. Supp. 933 (Dist. of N.H. 1973), the District Court declared invalid the New Hampshire statute authorizing pre-judgment attachment of real estate. An identical statute was declared unconstitutional in *Gunter v. Merchants Warren National Bank,* 360 F. Supp. 1085 (Dist. of Me. 1973). Again, in *Bay State Harness Horse R. & B. Association v. PPG Industries, Inc.,* 365 F. Supp. 1299 (1973), the Court declared unconstitutional a statutory attachment procedure, wherein it crystallized the reasoning of these cases:

> "Deprivation does not require actual physical taking of the property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected."

This Court has already expressed its concern over the cognovit system in *Citizens National Bank of Evans City v. Rose*

Appendix E

Hill Cemetery Assn. of Butler, 218 Pa. Super. 366 (1971), where, in denying a confession of judgment nunc pro tunc, it stated:

> "In our view there is a serious enough question as to the constitutional validity of any confession of judgment proceeding without permitting substantial violations of the Rules of Civil Procedure to be 'corrected' to the detriment of a debtor who would otherwise be sued in the normal, legal manner."

The last issue, therefore, is whether appellant can be found to have waived the protection of the due process guarantees by the execution of said note. Said note was prepared by Goodway's counsel, not appellant (R247a). Further, as indicated in Article III hereinabove, said note was executed in accommodation of the appellee, not as a result of an independent, true loan transaction with Goodway whereby appellant could be charged with the onus of constructive knowledge of its terms. Nowhere in the Record are there facts of the type present in *Overmeyer*[6] sufficient to support actual knowledge of such terms and knowing waiver of the constitutional due process guarantees. This Court must therefore hold that there has been no waiver by appellant of these constitutional safeguards.

6. Compare findings of fact set forth in *Overmeyer,* at pp. 178-182 of 405 U.S. 174.

APPENDIX F

PETITION FOR ALLOWANCE OF APPEAL

* * *

3. That the questions involved in this case are:

(a) Whether equitable estoppel prevents Petitioner from asserting the defenses set forth in his Petition against Cheltenham.

(b) Whether absent a clear showing of voluntary waiver, the entry of judgment by confession is a violation of the due process guarantees of the United States Constitution.

4. That the reasons for requesting allowance of appeal are as follows:

(a) That this case involves issues of immediate public importance inasmuch as it raises doubts as to the constitutionality of the confession of judgment procedure in effect in Pennsylvania.

* * *

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October Term, 1974

No. 74-1230

LOUIS R. SNELLING, III,

Petitioner,

vs.

CHELTENHAM NATIONAL BANK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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In The

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LOUIS R. SNELLING, III,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

COUNTER-STATEMENT OF THE CASE

On February 27, 1970, petitioner, Louis R. Snelling, III, (hereinafter sometimes referred to as "Snelling") executed a promissory note to Goodway Copy Centers, Inc. (hereinafter sometimes referred to as "Goodway") in the amount of $150,000, said note being the subject of this action.

Petitioner executed this promissory note for the sole purpose of securing a loan in the amount of $150,000 from Cheltenham National Bank (hereinafter sometimes referred to as "Bank"), in order to assist petitioner in financing the opening and operation of certain new copy centers in connection with a franchising agreement which had been entered into previously by petitioner and Goodway Copy Centers, Inc.

The aforesaid franchising agreement called for a substantial investment of funds on the part of Snelling, and, apparently, petitioner did not wish to risk any of his own funds in this venture due to the highly speculative nature of same. Therefore, petitioner made arrangements through Goodway Copy Centers, Inc. to use the money of Cheltenham National Bank instead.

In furtherance of this plan, on March 24, 1970, Goodway Copy Centers, Inc. assigned the aforesaid promissory note of petitioner to Cheltenham National Bank. In consideration for same, the Bank loaned to Snelling and Goodway Copy Centers, Inc. the sum of $150,000 on March 25, 1970.

At the time this loan was made to Snelling, he was a mature businessman and was serving as Senior Vice President and a Director of Snelling and Snelling, Inc., a large national employment service company, and he was the beneficial owner of more than ten percent of this company's stock. His salary was well in excess of $10,000 per year, and in addition thereto, he received certain expense account allowances, insurance, profit-sharing and stock option benefits. Further, he always had access to legal counsel and was, in fact, represented by legal counsel at that time.

The funds which were loaned by the Bank to Snelling were deposited in accounts held in the name of International Development Corporation and Goodway Copy Centers, Inc. International Development Corporation was a Pennsylvania corporation in which Snelling owned all of the outstanding shares and acted as President and Chairman of the Board and which was set up solely for the purpose of carrying on the aforesaid franchise business. Within three to four weeks thereafter, all of the aforesaid funds had been withdrawn from these accounts.

During the course of the following year, petitioner made regular monthly payments of interest on the subject loan to the Bank. No payments were made on the principal amount of the loan.

Near the end of March 1971, the Bank made demand upon Snelling and Goodway Copy Centers, Inc. to pay the principal amount of the loan together with any interest which had accrued to that time. Despite the Bank's demand, petitioner made no payments from that time to the present.

The Bank continued its efforts throughout the course of 1971 to secure payment on the principal and interest due on the loan, but all efforts failed.

In the early part of December 1971, the President of Cheltenham National Bank personally met with Snelling and Donald L. Wolk, President of Goodway Copy Centers, Inc., in an effort to resolve this matter. At this meeting, Snelling agreed to repay the principal and interest due on the loan on a payout

schedule of $20,000 initially and $25,000 quarterly thereafter until the full amount had been paid. In reliance on Snelling's representations, the Bank withheld any legal action to enforce collection of the amount due and owing to it.

A number of months passed by during which no payments were forthcoming. The Bank continued to press Snelling and Goodway Copy Centers, Inc. for payment but to no avail.

During this same period of time, the Bank requested from Snelling certain collateral to secure this debt. Snelling turned over to the Bank 18,444 shares of Snelling and Snelling, Inc. common stock which was owned by him, personally, in response to this request. Snelling claimed that the market value of this common stock at the time amounted to $75,000. An authority to pledge securities was signed by Snelling and delivered with the aforesaid stock to the Bank.

Although Snelling continuously acknowledged his debt to the Bank and continued to make numerous promises to repay same, no payments were made. Therefore, having exhausted all avenues of collection, the Bank was forced to confess judgment on the promissory note executed by Snelling.

The evidence clearly indicates that Snelling acknowledged his debt to the Bank both by his words and his actions. Snelling and/or his company, International Development Corporation, made regular interest payments on the loan during the course of the first year following the grant of the loan. Snelling agreed to make every effort to repay the debt more than one year after the loan had been granted. Further, he agreed to a pay-out schedule

after meeting with the President of Cheltenham NationalBank in the early part of 1971, more than one and one-half years after the loan had been granted. Still further, Snelling delivered to Cheltenham National Bank as collateral to secure this loan 18,444 shares of common stock of Snelling and Snelling, Inc. owned by him and having a value of $75,000, according to Snelling at that time. This stock was delivered to the Bank by Snelling two years after the loan had been granted.

Snelling never denied that this money was owed to the Bank. More importantly, he never raised any objections to repaying the money owed to the Bank nor did he ever mention any problem or defenses which existed between him and the original promisee, Goodway Copy Centers, Inc., until after the Bank had confessed judgment on the note almost three years after the loan had been made.

On April 6, 1973, after all collection efforts had failed, the Bank confessed judgment in the amount of $187,062.02 against Snelling on the warrant contained in the promissory note.

On May 16, 1973, Snelling filed his petition to open judgment which was the subject matter of proceedings in the state courts. The Bank filed a timely answer to same. Depositions of Snelling, Donald L. Wolk, President of Goodway Copy Centers, Inc., and Monroe W. Long, President of Cheltenham Bank, were taken. At these depositions, counsel for Snelling had full and complete opportunity to examine and cross-examine all the principals involved in the loan transaction. In addition, Snelling had the right to call for depositions of any other witnesses that he desired to substantiate his position and

he had the right to subpoena and make a part of the record any and all documents that he desired. He elected not to do so.

The depositions taken were transcribed and all documents entered as exhibits were copied and these were made part of the record in the case.

The case was submitted on this record and briefs and argued before the court en banc of the Court of Common Pleas of Montgomery County, Pennsylvania, on December 31, 1973; and on March 27, 1974, the court issued an order dismissing Snelling's petition to open judgment.

From this order, Snelling filed an appeal to the Superior Court of Pennsylvania, which affirmed the action of the trial court on September 23, 1974. Petitioner then applied for a writ of certiorari to the Supreme Court of Pennsylvania, which was denied on January 2, 1975.

ARGUMENT

At the outset, it is important to note that the decision of the trial court and the Superior Court of Pennsylvania, wherein Snelling's petition to open judgment was denied, was based upon an equitable estoppel and petitioner's efforts to challenge the constitutionality of the confession of judgment procedure in the Commonwealth of Pennsylvania had no bearing on the outcome of the case. (See opinion and order of the Court of Common Pleas and Superior Court of Pennsylvania, Appendix A and B of petitioner's brief.)

In his petition to open judgment, Snelling took the position that the note in question was not negotiable and that Cheltenham Bank was not a holder in due course; and as such, Snelling should be permitted to raise any defenses that he had against Goodway Copy Centers, Inc. on the original agreements and amendments between Snelling and Goodway.

The lower court decided that the note was negotiable and that the Bank was a holder in due course and that any defenses existing between Snelling and Goodway would be cut off since they were unknown to the Bank at the time the Bank took the note.

Further, the lower court, in its opinion, stated that even if the Bank was not a holder in due course of the note, by reason of Snelling's conduct and actions, he has estopped himself from asserting any defenses he may have as to Goodway against Cheltenham Bank.

The Superior Court of Pennsylvania affirmed the lower court's decision and, in its opinion, stated that Snelling was estopped from asserting defenses against the Bank, as assignee, on the basis that the facts in the case warranted an equitable estoppel.

The essential elements of an equitable estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. *United States National Bank in Johnstown v. Drabish,* 187 Pa. Superior Ct. 169.

Cheltenham Bank waited more than three years from the time it obtained the note until it confessed judgment. This forebearance on the part of the Bank was caused directly by the promises and actions of Snelling indicating clearly that he acknowledged the debt and would pay same.

This delay resulted in a prejudicial change in Cheltenham Bank's position, as outlined in the opinion of the Superior Court of Pennsylvania, and as indicated hereinafter.

Further, the aforesaid opinions and orders of the Court of Common Pleas of Montgomery County and the Superior Court of Pennsylvania were left standing by the Supreme Court of Pennsylvania when it denied petitioner's petition for an allowance of appeal to that Court.

In his brief, petitioner argues erroneously that, in the Commonwealth of Pennsylvania, the procedure for opening judgment may impose an undue burden of proof upon the defendant. This is not the case at all.

In fact, Rule 2959 of the Pennsylvania Rules of Civil Procedure was amended October 4, 1973, effective December 1, 1973, changing the burden of proof in Pennsylvania and adopting the Ohio procedure which requires opening where evidence is presented which, in a jury trial, would require the issues to be submitted to the jury. (See Appendix A herein.)

Under the Pennsylvania Rules of Civil Procedure, Rule 236, the Prothonotary of the Court shall immediately give written notice to the defendant when a judgment is entered by confession. (See Appendix B herein.)

Relief from a judgment by confession may be sought by filing a petition to open or strike the judgment. The court may stay all proceedings meanwhile.

The defendant then has full opportunity to take the testimony of all witnesses that he may desire, either by hearing or by depositions, and he may secure the production of all admissions, documents, and other evidence that he may desire to support his position. Subpoenas may be issued to enforce the appearance of witnesses or to secure the production of documents. Briefs are submitted and the case is then argued before the court en banc. If evidence is produced which in a jury trial would require the issues to be submitted to the jury, the court then must open the judgment. (See Rule 2959, Appendix A herein.)

Further, it should be noted that in Pennsylvania under the Act of January 30, 1974, Act No. 6 of 1974, P.L. , no execution may be had on any confessed judgment secured as a result of any document containing a confession of judgment clause, which, when confessed, effects a lien upon real estate, until the plaintiff therein have commenced an action and proceeded to judgment against defendant as in any original action, which judgment is then merged with the confessed judgment and execution may then, and only then, be issued on the confessed judgment.

Rule 2959 was amended to provide a major change in Pennsylvania practice. This rule was in effect at the time when this case was argued before the court en banc of the Court of Common Pleas of Montgomery County, Pennsylvania, on

December 31, 1973, and prior to the court's issuing its opinion and order dismissing petitioner's petition to open judgment on March 27, 1974.

Historically, it has been the rule in Pennsylvania that the opening of a confessed judgment is a matter within the discretion of the Common Pleas Court and the Appellate Courts will not reverse unless there has been an abuse of discretion. It placed upon the defendant the burden of persuading the court to open the judgment.

The amendment to Pennsylvania Rule of Civil Procedure 2959(e) meets the criticism of the United States Supreme Court in the cases of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) and *Swarb v. Lennox, et al.*, 405 U.S. 191 (1972), stating specifically that, if the defendant produces evidence, which, in a jury trial, would require the issues to be submitted to a jury, the court shall open the judgment.

There were certain other amendments to the confession of judgment rule on October 4, 1973, which were clarifying or technical in nature, but have no bearing on the issue in this case. This is brought to the attention of the court due to the fact that the Rules of Civil Procedure contained in Appendix C of petitioner's brief are inaccurate and do not contain the various amendments to these Rules as indicated herein.

Since this court has not held that confession of judgment without notice and opportunity for hearing pursuant to warrants of attorney are void, nor has it held that statutes and rules authorizing confession pursuant to warrants of attorney are void

per se or facially unconstitutional or is violative of due process requirements of prior notice and opportunity for hearing, petitioner's challenge in this particular case is totally unwarranted.

On the contrary, in *Overmyer, supra,* this court held that due process rights in civil matters could be knowingly, intelligently and voluntarily waived. It has suggested that "contracts of adhesion" in which there is an inequality of bargaining power and lack of consideration for the waiver are factors to be considered in determining whether contractual waivers in consumer transactions were voluntarily, knowingly and intelligently entered into.

Where, in *Overmyer,* as in this case, a warrant for confession of judgment was part of a commercial transaction between parties of equal bargaining ability and supported by consideration, it is clear that there was a valid contractual waiver of due process rights voluntarily, knowingly and intelligently made.

Here, the loan made to petitioner was part of a commercial transaction supported by consideration specifically bargained for. Petitioner was a sophisticated, experienced businessman who was serving as Senior Vice President and member of the Board of Directors of Snelling and Snelling, Inc., a large national employment service company, at the time he entered into the loan transaction; and he had ready access to legal counsel.

In *Fuentes v. Shevin,* 407 U.S. 67 (1972) and *Overmyer, supra,* which are relied upon by petitioner, it is apparent that the

contract of adhesion concept used in the consumer field does not really apply to commercial transactions between businessmen and corporations. It is apparent that the court has clearly recognized that important commercial interests require some form of pre-judgment remedy.

Although due process concepts may be proper in certain situations, they are certainly not appropriate in the field of commercial transactions. Inasmuch as the case at bar is one involving a commercial transaction and one involving a sophisticated experienced businessman, there is no reason to invalidate the confession of judgment c'ause in this case.

Further, there is some question that there is the requisite state action under the due process clause of the Fourteenth Amendment in the confession of judgment procedure in Pennsylvania, and particularly in this case. It would seem that the involvement of the state in this procedure is only passive and not significant. The procedure merely allows for a certain act of a private individual to occur; and active or direct state action which exists when the statute compels an event or a state official acts in concert or on behalf of an individual in performing the act on which the complaint is based, is not present in this procedure. Also, no property is seized or taken from the debtor as a result of the entry of judgment.

It is clear that in this case, petitioner was not rendered defenseless by execution of the cognovit note. He successfully avoided payment of his obligations for three years during which time Cheltenham Bank forbore from taking any action on the note due to petitioner's promises to pay. He has continued to

successfully avoid payment of his obligation for an additional two years since Cheltenham Bank confessed judgment on the note. All of this has been to the prejudice and damage of Cheltenham Bank inasmuch as Goodway Copy Centers, Inc. has sold all of its assets and gone out of business, International Development Corporation has no assets and is no longer in business and the Snelling and Snelling, Inc. stock pledged as collateral by petitioner has been severely depressed in value; and petitioner has gained a substantial amount of time within which to dispose of his valuable assets. The difficulty of obtaining the payment is self-evident.

CONCLUSION

For these reasons, respondent respectfully requests that petitioner's writ of certiorari be denied.

Respectfully submitted,

s/ Harry C. Barbin
Harry C. Barbin, Esq.
Attorney for Respondent

APPENDIX A

Pennsylvania Rules of Civil Procedure

Rule 2959. Striking Off or Opening Judgment. Pleadings. Procedures.

(a) Relief from a judgment by confession shall be sought by petition. All grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. The return day of the rule shall be fixed by the court by general rule or special order.

(c) A party waives all defenses and objections which he does not include in his petition or answer.

(d) The petition and the rule to show cause shall be served as provided in Rule 233, and the answer as provided in Rule 1027.

(e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence. The court for cause shown may stay proceedings on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment. If evidence is produced, which, in a jury trial, would require the issues to be submitted to the jury, the court shall open the judgment.

APPENDIX B

Pennsylvania Rules of Civil Procedure

Rule 236. Notice by Prothonotary of Entry of Order, Decree or Judgment.

(a) The prothonotary shall immediately give written notice by ordinary mail of the entry of any order, decree or judgment:

(1) When a judgment by confession is entered, to the defendant at his address stated in the certificate of residence filed by the plaintiff; and

(2) In all other cases, to each party who has appeared in the action or to his attorney of record.

(b) The prothonotary shall note in the docket the giving of the notice.

(c) Failure to give the notice shall not affect the lien of the judgment.